No. 274

JUL 31 1942

CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term, 1942

LOGAN W. MARSHALL AND GRACE M. MARSHALL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Thomas C. Lavery,
Frederick Woodbridge,
Attorneys for Petitioners.

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CASES CITED.

STATUTES CITED.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. ————.

LOGAN W. MARSHALL and GRACE M. MARSHALL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT.

Logan W. Marshall and Grace M. Marshall, petitioners herein, own a Montana farm, situate in Lake County, Montana, and an Ohio farm of two hundred and seventy-five acres situate in Shelby County, Ohio. The Montana farm was purchased in March, 1928, and petitioners at once sought to develop it by clearing the ground and planting a sweet-cherry orchard. After seven years of toil and expense, however, petitioners' efforts went for naught due to an unsea-

sonable and extraordinary freeze in October, 1935, which practically destroyed the orchard. The extent of petitioners' loss was not disclosed until the spring of 1936, when two hundred eight-year-old trees were found to be dead. Petitioners strove to save the orchard, but in 1937 most of the remainder of the trees were found to be dead or had sprouted below the graft to thorn-tree roots, thereby becoming thorn trees of no value whatever (R. 15-16).

In their income-tax return for the calendar year 1936, petitioners claimed a deduction representing a loss of $10,607.99 from the business of farming (R. 57), of which $7,000 represented the loss of two hundred trees caused by the freeze. They also claimed a loss of $90 from theft of personal property from the Montana farm. In their income-tax return for the calendar year 1937, they claimed a deduction representing a loss of $7,390.42 from the business of farming (R. 63), of which $3,832.50 represented the loss of 75 trees caused by the freeze, and $90 represented damage done by a flood to a bridge, dam, and fence on the Ohio farm. The remainder of the deductions claimed in 1936 and 1937 consisted of items of expenditure for labor, material, and supplies, interest, taxes, and depreciation incident to the business of developing and operating the Montana and Ohio farms.

With the exception of taxes paid on account of petitioners' farms, respondent disallowed the deductions claimed on the ground that petitioners were not engaged in the business of farming and that the basis for determining the loss of the orchard from the freeze had not been established. Thereupon petitioners filed a petition for redetermination with the United States Board of Tax Appeals and at the hearing sought to show the contents of certain schedules which had been attached to their original return for the year 1936, as it had been filed with respondent, by the use of secondary

evidence after respondent had been unable to produce or account for the original schedules (R. 28-32). They also offered the testimony of petitioner, Logan W. Marshall, as to the value of certain property which they owned and upon which the claim of loss was based (R. 40-41). The Board, however, refused to permit the use of secondary evidence and to allow Logan W. Marshall to testify; and affirmed the determination of respondent on two grounds: (1) the evidence offered by petitioners failed to show an enterprise entered into for profit or a trade or business (R. 17-18) and (2) no competent evidence of the number and value of the trees lost had been adduced (R. 17). Petitioners then sought a review of the decision of the Board by the United States Circuit Court of Appeals for the Sixth Circuit, but that Court, with an exception not now material, affirmed the action of the Board, upon the ground that there was substantial evidence to support the decision of the Board (R. 85).

OPINIONS BELOW.

The United States Board of Tax Appeals filed a memorandum opinion on February 12, 1941, which is unreported (R. 15-18). The United States Circuit Court of Appeals for the Sixth Circuit did not write an opinion but merely entered an order dated May 8, 1942, affirming the action of the Board (R. 85). On May 27, 1942 petitioners filed a petition for rehearing (R. 87) which on June 5, 1942 was denied (R. 91).

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed is contained in the order referred to, which was entered May 8, 1942 (R. 85).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, § 347, U. S. C.).

QUESTIONS PRESENTED.

1. Did the United States Circuit Court of Appeals for the Sixth Circuit err in affirming the action of the United States Board of Tax Appeals in excluding secondary evidence offered by petitioners of the contents of certain schedules which had been attached to the original return of petitioners for the year 1936 as it was filed with respondent and which he was unable to produce or account for at the hearing before the Board?

2. Did said Court err in affirming the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which he owned and upon the loss of which he based his claim in this case?

3. Did said Court err in affirming the action of said Board in finding that its conclusions were supported by substantial evidence?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

1. The affirmance by the United States Circuit Court of Appeals for the Sixth Circuit of the action of the United States Board of Tax Appeals in refusing to permit petitioners to use secondary evidence of the contents of the schedules which had been attached to their income-tax return for the calendar year 1936 and which respondent was unable to produce or account for at the hearing; and of its action in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which he owned and upon the loss of which petitioners based their claim in this case, constitutes a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Cornett* v. *Williams*, 20 Wallace 226, 246, 22 L. Ed. 254 (1873); *Sicard* v. *Davis*, 6 Peters 124, 8 L. Ed. 342 (1832).

2. In neglecting or refusing to discharge its duty to decide the questions of law presented by the refusal of the United States Board of Tax Appeals to permit petitioners to use secondary evidence or to allow petitioner, Logan W. Marshall, to testify as to the value of his property, assigned as error in the petition for review (R. 27), the United States Circuit Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has so sanctioned such a departure by the United States Board of Tax Appeals as to call for an exercise of this Court's power of supervision, in order that petitioners may not be denied their day in court. *Cohens* v. *Virginia*, 6 Wheaton 264, 5 L. Ed. 257 (1821); *Hormel* v. *Helvering*, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

3. In holding that there was substantial evidence to support the finding of said Board that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937, the decision of said Court is erroneous as a matter of law and is in direct conflict with the decisions of other circuit courts of appeals on the same matter. *Wilson* v. *Eisner*, 282 Fed. 38 (CCA, 2d, 1922); *Commissioner of Internal Revenue* v. *Widener*, 33 F. (2d) 833 (CCA, 3d, 1929); *Commissioner of Internal Revenue* v. *Field*, 67 F. (2d) 876 (CCA, 2d, 1933); *Whitney* v. *Commissioner of Internal Revenue*, 73 F. (2d) 589 (CCA, 3d, 1934).

In support of the foregoing grounds of application for a writ of certiorari petitioners submit the accompanying brief.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete tran-

script of the record of the proceedings in case No. 9030, entitled on its docket "Logan W. Marshall and Grace M. Marshall v. Commissioner of Internal Revenue," and that the judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

THOMAS C. LAVERY,
FREDERICK WOODBRIDGE,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. ————.

LOGAN W. MARSHALL and GRACE M. MARSHALL,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

Opinions below have been described in the petition for writ of certiorari under the caption "Opinions Below," ante, p. 3.

II.

JURISDICTION.

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari under the caption "Jurisdiction," p. 3.

III.

STATEMENT OF THE CASE.

The facts have been stated in the petition for writ of certiorari under the caption "Summary Statement," ante, pp. 1-3.

IV.

SPECIFICATIONS OF ERROR.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in affirming the action of the United States Board of Tax Appeals in excluding secondary evidence offered by petitioners of the contents of certain schedules which were attached to their original income-tax return for the calendar year 1936 as it was filed with respondent and which he was unable to produce or account for at the hearing before said Board;

2. Said Circuit Court erred in affirming the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which petitioners owned and upon the loss of which they based their claim in this case;

3. Said Circuit Court erred in affirming the action of said Board in finding that its conclusions of fact were supported by substantial evidence.

4. Said Circuit Court erred in affirming the decision of said Board.

V.

SUMMARY OF ARGUMENT.

A. By its affirmance of the action of the United States Board of Tax Appeals in refusing to permit petitioners to

use secondary evidence of the contents of certain schedules which were attached to their income-tax return for the calendar year 1936 and which respondent was unable to produce or account for at the hearing, the United States Circuit Court of Appeals for the Sixth Circuit rendered a decision upon a federal question in a way probably in conflict with the applicable decisions of this Court.

B. By its affirmance of the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which petitioners owned and upon the loss of which they based their claim in this case, said Court rendered a decision upon a federal question in a way probably in conflict with the applicable decisions of this Court;

C. Said Court in neglecting or refusing to discharge its duty to decide questions of law presented to it by the refusal of said Board to permit petitioners to use secondary evidence or to allow petitioner, Logan W. Marshall, to testify as to the value of petitioners' property, so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by said Board as to call for an exercise of this Court's power of supervision;

D. The decision of said Circuit Court in holding that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937 is in conflict with the decisions of other circuit courts of appeals and of some federal district courts.

ARGUMENT.

A.

Under the federal rules of evidence secondary evidence is admissible to prove the contents of a writing where the original thereof is lost or unaccounted for.

At the hearing of this cause before the United States Board of Tax Appeals, petitioners moved to require respondent to disclose who was in possession of their original income-tax return for the calendar year 1936, to produce it, and to submit to cross-examination (R. 28). Respondent admitted that he was unable to produce or account for the original return as filed (R. 31). The purpose of petitioner's motion was to lay the foundation for the use of secondary evidence. Upon respondent's objection the Board refused to receive the evidence offered and petitioners excepted (R. 32). In *Cornett* v. *Williams*, 20 Wallace 226, 22 L. Ed. 254 (1873), this Court held that a copy of an official certified copy of the records of a court, which court records had been burned, was admissible. In the case at bar, the evidence offered by petitioners was in the form of a photostatic copy of the original schedules attached to petitioners' return for the calendar year 1936 as filed and it was, therefore, the best evidence which petitioners had it in their power to produce as required by the *Cornett* case, where it was said that "the rule is to be so applied as to promote the ends of justice * * * " The rule in the *Cornett* case has not been disputed. *Wigmore, Evidence*, 3d Ed., § 1275, note 7 (1940); *In re Margolis*, 23 FS 735 (D.C.S.D.N.Y., 1937); see also *Sicard* v. *Davis*, 6 Peters 124, 8 L. Ed. 342 (1832).

B.

Under the federal rules of evidence the owner of property is competent to testify as to its value, and his testimony with respect thereto is admissible.

At the hearing of this cause before the Board, petitioner, Logan W. Marshall, sought to testify as to the value of the property destroyed by the unprecedented freeze, in order to establish the basis upon which petitioners claimed a deduction representing their loss (R. 40); but upon objection by respondent the evidence was excluded and petitioners excepted (R. 41-42).

The law is well settled that the owner of land is deemed to be qualified to speak as to its value; and the owner of personal property may estimate its worth. *Gorman* v. *Park*, 100 Fed. 553 (1900); *Union Pacific Railroad Company* v. *Lucas*, 136 Fed. 374, 69 CCA 218 (1905); *Alaska Juneau Gold Mining Company* v. *Larson*, 279 Fed. 420 (CCA, 9th, 1922); *Barrett* v. *Fournial*, 21 F. (2d) 298 (CCA, 2d, 1927); *Wigmore, Evidence*, 3d Ed., §§ 714, 716 (1940).

C.

Questions of the admission and exclusion of evidence are questions of law which it is the duty of a circuit court of appeals to decide when such questions are properly presented to it for decision.

The exception taken by petitioners to the action of the Board in excluding evidence offered by them at the hearing and the assignment of such action as error in the petition for review to the United States Circuit Court of Appeals for the Sixth Circuit presented to that Court a question of

law for its decision. In affirming the decision of the Board, however, that Court neglected or refused to rule upon the questions of law involved and contented itself with basing its affirmance upon the ground that there was substantial evidence to support that decision (R. 85). By so doing, the Court failed to exercise the exclusive jurisdiction which is vested in it to review decisions of the Board and to determine whether or not its rulings on the evidence offered by petitioners were in accordance with law. Title 26, § 1141 (a) (1), U. S. C., appendix, this brief, p. 16; *Cohens* v. *Virginia*, 6 Wheaton 264, 5 L. Ed. 257 (1821); *Hormel* v. *Helvering*, 312 U. S. 552, 556, 61 S. Ct. 719, 85 L. Ed. 1037 (1941); *Commissioner of Internal Revenue* v. *Independent Life Insurance Company*, 67 F. (2d) 470 (CCA, 6th, 1933). On the assumption that the Board did err in excluding competent evidence, petitioners have in effect been deprived of their day in court; and in any event, the question whether or not the Board erred in that respect is a question of law which it was the duty of the Circuit Court of Appeals to decide.

D.

The decision of said Court that there was substantial evidence to support the findings of fact of said Board that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937 is erroneous as a matter of law and is in direct conflict with the decisions of other circuit courts of appeals and of some federal district courts.

In its order of May 8, 1942 (R. 85), the Circuit Court found that there was substantial evidence to support the decision of the Board and its order, except as modified in

a particular not here material, was affirmed (R. 85). The only evidence of record on this point was that offered by petitioners which, without contradiction, established that petitioners had purchased the Montana farm in 1928 for the purpose of planting a sweet-cherry orchard and of making a profit (R. 38); that they made investigations and conducted correspondence with the Chief of the Division of Horticulture, Department of Agriculture, State of Montana, and Mr. R. W. Hockaday, a man with over seventeen years' experience (R. 38-39, 75-81) in the methods of growing sweet-cherry orchards, with reference to types of trees, probable costs, yields, expenses, prices of products, markets, competition, etc. (R. 75-81); that they purchased their Ohio farm in 1930 and operated it in conjunction with a tenant (R. 49); that they kept careful records of the income and expenditures of each farm (R. 43); and that they did not either farm for vacation purposes since they spent very little time there (R. 15-17). There is absolutely no evidence in the record to show that petitioners were not operating their farms for the purposes for which they were adapted or to prove that they were pursuing a hobby. On the contrary, the record shows that petitioners were striving at all times to follow approved farming methods and to make a profit if they could (R. 16).

This Court has said that "Business is a very comprehensive term and embraces everything about which a person can be employed," and it has defined the term "business" as "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 171, 31 S. Ct. 342, 55 L. Ed. 389 (1910). While the phrase "for the purpose of • • • profit" appears in this definition, the courts have repeatedly held that an undertaking can be deemed to be a business even though no profit is made so long as the taxpayer goes

into the venture with the intention and for the purpose of making a profit. *Commissioner of Internal Revenue* v. *Widener*, 33 F. (2d) 833 (CCA, 3rd, 1929); *Plant* v. *Walsh*, 280 Fed. 722 (D. C. Conn., 1922); *Commissioner of Internal Revenue* v. *Field*, 67 F. (2d) 876 (CCA, 2d, 1933). Indeed, these cases sustained deductions where regular losses were the rule and not the exception. It is the intention of the taxpayer in entering into the business that is controlling, and such intention must be determined from the facts of record. *Thacher* v. *Lowe*, 288 Fed. 994 (D.C.S.D.N.Y., 1922); *Commissioner of Internal Revenue* v. *Field*, supra; *Wilson* v. *Eisner*, 282 Fed. 38 (CCA, 2d, 1922). Good indicia of intention lie in the facts that the taxpayer maintains bookkeeping records, *Whitney* v. *Commissioner of Internal Revenue*, 73 F. (2d) 589 (CCA, 3d, 1934; *George* v. *Commissioner*, 22 BTA 189 (1931); that he studies the problems of the business in which the losses are sustained, *Commissioner* v. *Field*, supra; and that he conforms his activities to the circumstances of his undertaking in order to enhance his chances of making a profit.

The courts have consistently held that farming comes within the definition of a business when it is conducted with a view to making a profit, regardless of whether a profit is made or may be made. *Thacher* v. *Lowe*, 288 Fed., 994 (D.C.S.D.N.Y., 1922); *Plant* v. *Walsh*, 280 Fed. 722 (D. C. Conn., 1922); *Whipple* v. *United States*, 25 F. (2d) 520 (D. C. Mass., 1928); *The Union Trust Company* v. *Commissioner*, 54 F. (2d) 199 (CCA, 6th, 1931). The Board has adhered to this principle and respondent has embodied it in his regulations. *Edwin S. George* v. *Commissioner*, 22 BTA 189 (1931); Regulations 94, Art. 23(e)-5, p. 59. (Appendix p. 17-18).

The Circuit Court of Appeals did not pass directly upon the question whether or not petitioners were engaged in

the business of farming during the calendar years 1936 and 1937, but by affirming the decision of the Board which found that petitioners were not so engaged during those years, it has impliedly done so. Manifestly, the result in this case is, therefore, in direct conflict with the decisions of the Circuit Courts of Appeals for the Second and Third Circuits on analogous facts. *Commissioner of Internal Revenue* v. *Field*, 67 F. (2d) 876 (CCA, 2d, 1933); *Commissioner of Internal Revenue* v. *Widner*, 33 F. (2d) 833 (CCA, 3d, 1929). It does not appear that this Court has passed upon the question.

The evidence offered by the petitioners shows that the indicia of intention to farm as a business were present in this case and that instead of there being substantial evidence to support the Board's finding that they were not so engaged, there was no evidence whatever pointing in that direction. Accordingly, whether or not the petitioners were engaged in the business of farming should have been decided in petitioners' favor as a question of law, and the Circuit Court failed to perform its duty and thereby erred in not so deciding . *Wilson* v. *Eisner*, 282 Fed. 38 (CCA 2d, 1922). See also *Deputy* v. *DuPont*, 308 U. S. 488, 499, 60 S. Ct., 363, 84 L. Ed. 416 (1940), concurring opinion by Mr. Justice Frankfurter.

It is, therefore, respectfully submited that the Writ of Certiorari should be granted.

THOMAS C. LAVERY,
FREDERICK WOODBRIDGE,
Attorneys for Petitioners.

APPENDIX.

Title 28, § 347 (Judicial Code § 240, amended) U.S.C.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Title 26, § 1141(a), U.S.C.:

"Jurisdiction. The Circuit Court of Appeals and the United States Court of Appeals for the District of Columbia

shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U.S.C., Title 28, § 346); and the judment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U.S.C., Title 28, § 347)."

Title 26, § 1141(c)(1), U.S.C.:

"(c) Powers (1) To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

Article 23(e)-5, Regulations 94:

"Losses of farmers.—Losses incurred in the operation of farms as business enterprises are deductible from gross income. If farm products are held for favorable markets, no deduction on account of shrinkage in weight or physical value or by reason of deterioration in storage shall be allowed, except as such shrinkage may be reflected in an inventory if used to determine profits. The total loss by frost, storm, flood, or fire of a prospective crop is not a deductible loss in computing net income. A farmer engaged in raising and selling stock, such as cattle, sheep, horses, etc., is not entitled to claim as a loss the value of animals that perish from among those animals that were raised on the farm, except as such loss is reflected in an inventory if used. If live stock has been purchased after February 28, 1913, for any purpose, and afterwards dies

from disease, exposure, or injury, or is killed by order of the authorities of a State or the United States, the actual purchase price of such live stock less any depreciation allowable as a deduction in respect of such perished live stock, may be deducted as a loss if the loss is not compensated for by insurance or otherwise. The actual cost of other property (with proper adjustment for depreciation) which is destroyed by order of the authorities of a State or of the United States, may in like manner be claimed as a loss. If reimbursement is made by a State or the United States in whole or in part on account of stock killed or other property destroyed in respect of which a loss was claimed for a prior year, the amount received shall be reported as income for the year in which reimbursement is made. The cost of any feed, pasturage, or care which has been deducted as an expense of operation shall not be included as part of the cost of the stock for the purpose of ascertaining the amount of a deductible loss. If gross income is ascertained by inventories, no deduction can be made for live stock or products lost during the year, whether purchased for resale or produced on the farm, as such losses will be reflected in the inventory by reducing the amount of live stock or products on hand at the close of the year. If an individual owns and operates a farm, in addition to being engaged in another trade, business, or calling, and sustains a loss from such operation of the farm, then the amount of loss sustained may be deducted from gross income received from all sources, provided the farm is not operated for recreation or pleasure. As to losses claimed as deductions for estate tax purposes, see article 23(e)-1. See also article 22(a)-7, 23(a)-11, and 23(l)-10."

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 274

LOGAN W. MARSHALL AND GRACE M. MARSHALL, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 15–18) is not reported. The Circuit Court of Appeals delivered no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 8, 1942 (R. 85), and modified on June 29, 1942 (R. 91). A petition for rehearing was denied on June 5, 1942 (R. 91). The petition for a writ of certiorari was filed on July

31, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in affirming the finding of the Board that the taxpayers had not sustained the burden of proving that they were entitled to deductions for income-tax purposes in 1936 and 1937 on account of the alleged loss in those years of cherry trees, such loss having resulted from a freeze in October 1935.

2. Whether the court below erred in rejecting secondary and opinion evidence concerning the value of the trees.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or
>
> (3) of property not connected with the trade or business, if the loss arises from

fires, storms, shipwreck, or other casualty, or from theft. * * *

* * * * *

STATEMENT

Petitioners, husband and wife, filed joint income-tax returns for 1936 and 1937 (R. 57, 63). The underlying facts, which are not in dispute, may be summarized from the findings of the Board of Tax Appeals (R. 15–17) as follows:

In 1928 petitioner Logan W. Marshall purchased a farm on an island in Flathead Lake, Montana. He considered the raising of sweet cherries on the farm, and in September 1928 received letters, in answer to inquiries, from the Chief of the Division of Horticulture of the Montana Department of Agriculture and from R. W. Hockaday, a grower of cherries on the island (R. 15, 75–81). These letters conveyed information concerning the choice of varieties of cherry trees, the cultivation and marketing of cherries, and the cost of trees in quantity.

In 1929 Marshall planted a sweet-cherry orchard on his Flathead Lake island farm. The orchard was cultivated in that and successive years toward maturity. In October 1935 there occurred a severe storm and freeze. Damage to the trees was discovered the following spring; a large proportion of them were found then to be destroyed. Most of the balance were found in 1937 to have been destroyed or severely damaged, after efforts had

been made in the intervening year to save these trees.

Petitioner Marshall's activities in connection with the farm were limited to visits during the summer, varying in duration from a few days to three months. The farm is improved by a cottage of eight rooms, a water-pumping system for irrigation, a tool house, an automatic electric system, and two boathouses (housing an outboard-motored barge and a Chrysler speed boat). Marshall derived no profits from the farm during or prior to the tax years now in question (R. 16, 53). Over 95% of his income after 1927 was received as compensation for the performance of legal services (R. 6, 18).

Petitioners in their tax returns for 1936 and 1937 deducted $7,000 and $3,832.50, respectively, on account of the loss of cherry trees (R. 59, 67). The Commissioner of Internal Revenue disallowed these deductions and sent notice to petitioners of a deficiency in tax (R. 10–13). On review the Board of Tax Appeals sustained the Commissioner (R. 22). The Circuit Court of Appeals for the Sixth Circuit affirmed.

ARGUMENT

1. The Board concluded that petitioners had not sustained the burden of proving the tree losses which they claimed for 1936 and 1937. It found that the trees were frozen in 1935, and stated that there was no indication as to how many were

killed in that year and how many were lost in the tax years 1936 and 1937 (R. 17). Petitioner Marshall's attention was directed at the trial to this issue of fact (R. 17, 34, 43), but he produced no evidence bearing on it (see R. 28–56). The Board was clearly warranted, therefore, in determining (R. 18) that there was no evidence showing that the losses had occurred during 1936 and 1937.

The statute authorizes a deduction for "losses *sustained* during the taxable year." [Italics supplied.] Section 23 (e) of the Revenue Act of 1936. This standard of allowability is objective; unless a taxpayer proves that a loss was *sustained* during the tax year, no deduction is authorized. Accordingly, the decision of the Circuit Court of Appeals in affirming the Board's conclusion is plainly correct.

2. Petitioners complain (Pet. 8) of rulings of the Board of Tax Appeals excluding evidence offered by them concerning the value of the cherry trees. The contention that the court below erred in affirming these rulings is without importance in view of the failure to prove that the losses of trees were sustained during the tax years. In any event the rulings appear correct. Photostatic copies of schedules allegedly attached by petitioners to their 1936 return constituted only secondary evidence of the expenditures made on the farm; no proper foundation was laid by peti-

tioners for admitting it, since petitioner Logan W. Marshall apparently had in his possession the cancelled checks with which the scheduled expenditures were made (see R. 29–30, 36–37, 43–44). Further, it is doubtful whether the schedules sought to be introduced were material on the question of value, since they apparently contained chiefly accounts of disbursements for labor, taxes, repairs, and miscellaneous expenses on the farm without specific allocation to trees shown to have been destroyed in the years involved (see R. 36–37, 43; cf. R. 73).

Petitioners also offered opinion evidence of petitioner Logan W. Marshall concerning the value of the trees (R. 39–40). The Board sustained the Government's objection to this testimony on the ground that Marshall had not qualified himself to give opinion evidence. While he was owner of the personal property concerning the value of which he wished to testify, he was not expert in the matter of cherry orchards; his chief occupation was as a lawyer and he spent little time at the Montana farm (see Statement, *supra,* page 4). In addition, his opinion evidence appeared to be no more than the product of conjecture. (See R. 39–42.)

3. The Board correctly observed that petitioner Logan W. Marshall had not been shown to have engaged in orchard-farming as a business or as an enterprise for profit, and that therefore section

23 (e) (1) and (2) is in no event applicable here. Moreover, it expressly omitted to decide whether the storm and freeze of October 1935 was a cause of loss coming within the scope of section 23 (e) (3) of the Revenue Act (R. 18). Under the circumstances, there can be no conflict with the decisions relied upon by petitioner (Pet. 13–15) relating to the applicability of section 23 (e), for the absence of a showing that the claimed losses occurred when alleged foreclosed the applicability of any clause of section 23 (e) here.

CONCLUSION

The decision of the Circuit Court of Appeals is clearly right and presents no conflict or question calling for further review. It is therefore respectfully submitted that the petition for certiorari should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.
LEONARD C. MEEKER,
Attorney.

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